No. 3902

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

David Taylor,

Appellant,

vs.

Nevada Humboldt Tungsten Mines Company (a corporation), Tungsten Products Company (a corporation), Mill City Development Company (a corporation), W. J. Loring, C. W. Poole, R. Nenzel, H. J. Murrish, L. A. Friedman, C. H. Jones, G. K. Hinch, J. T. Goodin, V. A. Twigg, J. C. Huntington and Lena J. Friedman, individually,

Appellees.

BRIEF FOR APPELLEE W. J. LORING.

John F. Davis,
Charles S. Wheeler,
Charles S. Wheeler, Jr.,
Attorneys for Appellee Loring.

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DAVID TAYLOR,

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vs.

NEVADA HUMBOLDT TUNGSTEN MINES COMPANY (a corporation), TUNGSTEN PRODUCTS COMPANY (a corporation), MILL CITY DEVELOPMENT COMPANY (a corporation), W. J. LORING, C. W. POOLE, R. NENZEL, H. J. MURRISH, L. A. FRIEDMAN, C. H. JONES, G. K. HINCH, J. T. GOODIN, V. A. TWIGG, J. C. HUNTINGTON and LENA J. FRIEDMAN, individually,

Appellees.

BRIEF FOR APPELLEE W. J. LORING.

Statement of Facts.

W. J. Loring is not charged with any wrongdoing whatever, and yet he is the respondent whose financial interests are more deeply affected by this litigation than are those of any other defendant.

The record establishes the following facts:

On July 21, 1919, Mr. Loring entered into negotiations with certain stockholders of defendant corporations looking to the purchase from said corporations of certain properties belonging to them (Record, pp. 700, 701, 1111-13).

On said date a so-called "option" was given to Loring by said stockholders for the purchase of properties belonging to the said corporations, and on August 9, 1919, a modification of this "option" was signed (Record, pp. 1114, 1115).

On August 10, 1919, plaintiff Taylor wired defendant Loring as follows:

> "Reno newspaper reports dispatch from Imlay stating you have bought Friedman tungsten interests in Mill City district. Would appreciate your wiring early Monday as to what if any Nevada Humboldt interests you have bought. The companies and stockholders owe me considerable money and my attorneys consider I have good case for compelling present stockholders assign to me control of stock of both companies or as alternative heavy damages. My action will largely depend on what if any interest you may have as I don't want involve you in this mess" (Record, p. 834).

On August 11, 1919, Loring replied as follows:

> "I hold option on Nevada Humboldt interests" (Record, p. 835).

It will be noted that Taylor in his wire had said (italics ours):

> "* * * My attorneys consider I have good case for compelling present stockholders

> assign to me control of stock of both companies *or as alternative* heavy damages. My actions will largely depend on what if any interests you may have as I don't want involve you in this mess'' (Record, p. 834).

Five days after being advised by Loring that Loring held an option on the Nevada Tungsten interests, Taylor, on August 16, 1919, brought what he himself had termed an "alternative" suit against the defendants other than Loring for "heavy damages", viz.: $114,579.44 (Record, pp. 936-956).

Taylor's charges, for which he thus asks damages, are substantially identical with the charges in the bill here. It thus appears that now he is suing not on one but on both of his ''alternatives''. It will be noted that he did not file the bill in the case at bar until over eight months after he had brought his said action at law (Record, p. 1165).

On August 16, 1919—the same day on which Taylor filed his complaint at law for damages—respondent Loring signed an agreement for the purchase of the mining properties of the defendant corporations (Record, pp. 991 et seq.). This agreement contemplated a ratification by the stockholders of said corporation at meetings to be held on August 23, 1919 (Record, p. 1048 et seq.). No money was to be due from Loring until September 1, 1919, when the first payment of $50,000.00 on account of the purchase price was to be made (Record, p. 1023). Loring learned that Taylor had

brought his action at law. He caused the papers in the case to be examined by his counsel, and on August 19, 1919, learned that Taylor's suit was for damages only and that Taylor in said suit laid no claims to any shares of stock (Record, pp. 706, 707, 708, 1116, 1117).

In this connection it should be remembered that Taylor's wire to Loring of August 10, 1919, had said in substance that whether he (Taylor) would sue for specific performance or for heavy damages would depend upon what interest Loring might have in the matter and that he did not wish to involve Loring; and that after being informed by Loring's wire that Loring was interested, Taylor had actually filed suit for damages (Record, p. 834).

On August 23, 1919, at a meeting of stockholders of Nevada-Humboldt Tungsten Mines Company, more than ninety-four per cent. of the total issued stock was present and voted to ratify the Loring agreement (Record, pp. 1048-1054).

Appellant Taylor owned 5000 shares of stock in said corporation. He was notified that the meeting would be held and by "his attorney and proxy" objected at the meeting to the ratification of the Loring agreement upon the ground that notice of the meeting was insufficient and that the sale was beyond the powers of the directors (Record, pp. 848-849, 1049, bottom).

It is to be noted that Taylor's written protest which is dated August 22, 1919, is based on his ownership of 5000 shares of stock and contains no claim whatever that Taylor is equitably entitled to sixty-two per cent. of the stock of the corporation. Moreover, his notice is addressed to the defendants from whom he now claims this stock "as stockholders" (Record, p. 848). After the vote of the stockholders ratifying the transaction with Loring, deeds were executed to Loring on August 23, 1919 (Record, pp. 1070-1087).

On September 1, 1919, Loring paid $50,000.00 on account of the purchase price of the properties.

On October 1, 1919, a second payment of $50,-000.00 was made by Loring.

On November 15, 1919, he made a third payment of $50,000.00.

On December 27, 1919, he made a fourth payment of $50,000.00, and on February 4, 1920, he paid the further sum of $33,333.33.

The appellant knew all about these payments and he waited until after a total of $233,333.33 had been paid to the defendant corporation by Loring before he brought this suit. The complaint here was filed on April 17, 1920 (Record, pp. 1125-1165).

Not only this, but Taylor knew that the moneys so paid in by Loring were being used to pay off the debts of the defendant corporations (Record, pp. 734-740).

Knowledge of his attorney was knowledge of Taylor.

4 *Cyc.* 933, 934;
Rogers v. Palmer, 12 Otto, 102 U. S. at p. 268;
Wormser v. Metropolitan Street Ry. Co., 184 N. Y. at pp. 87, 88, 91;
Thompson v. Angel, 13 N. Y. Supp. at p. 93;
3 *Cook on Corporations* (6th ed.), Sec. 730.

But even that is not the worst of Taylor's conduct. He was, himself, one of the creditors of the defendant Nevada Humboldt Tungsten Mines Company to the amount of $9000 (Record, pp. 681, 682), and he accepted payment of his claim for this money, knowing that Loring had paid it in on account of the purchase price under his contract (Record, pp. 734-740). Taylor now stands before this Court with Loring's money jingling in his pockets and asks this Court of conscience to prevent the corporations defendant from perfecting Loring's titles to the lands for which Loring has paid in full (Record, pp. 1145, 1146). Taylor tells the Court in his bill of complaint that he has brought another suit to set aside Loring's deeds and contract (Record, p. 1139), and in this present action he is asking the aid of the Chancellor to help him consummate that result (Record, pp. 1139-1142).

I.

APPELLANT'S DEMAND AGAINST LORING IS UTTERLY UNCONSCIONABLE.

Three weeks before respondent Loring paid over any portion of the purchase price under his contract, appellant Taylor had wired him that he was advised that he, Taylor, had a cause of action against the defendant stockholders either for specific performance to compel them to deliver stock to him or "*as an alternative* heavy damages". He further said in substance that he did not want to involve Loring and that his actions with regard to the kind of suit he would bring—whether to gain possession of the control of the stock in defendant corporations or for heavy damages—would largely depend on what, if any, interest Loring had (Record, p. 834). He was promptly informed by Loring that Loring held an option on the properties. Six days later he brought his suit against said stockholders for heavy damages, viz.: $114,719.44, for their alleged failure to comply with their contract to deliver said stock to him. That suit is still pending. Knowing that after he had filed that suit at law, Loring had entered into his contract to purchase the properties belonging to defendant corporations, Taylor kept silent for about eight months, and then he brought this suit seeking to upset the arrangement with Loring; but he did not bring it until all of the indebtedness of the defendant corporations had been paid off with the money received by them from Loring under the contract

of purchase and sale, and not until Taylor had knowingly accepted more than $7000.00 in satisfaction of his creditor's claim against one of the defendant corporations. And he did this, knowing that Loring had paid in that money to the corporations on account of the sale which Taylor is here asking this Court to help him repudiate. The defendant corporations are now freed from $200,000.00 of debt, thanks to Loring's money, and they have a substantial surplus in their treasuries, all the result of the cash received from Loring. In the face of these facts, Taylor has the audacity to to ask this Court of Conscience to award him sixty-two per cent. of the corporate stock in order that he may defeat the titles for which Loring has paid over the money. And Taylor's conscience does not even prick him hard enough to lead him to offer to restore a single dollar to Loring.

Of course, Taylor is precluded by the ordinary rules of conscience and fair dealing from asserting against Loring his claim in a court of equity. If the corporations were themselves seeking to repudiate the contracts with Loring, or to cancel his deed, they would be told that they could not take and keep Loring's money and make no offer to restore it to him and have any relief in this Court.

Beach v. Miller, 130 Ill. 162, at p. 174;
Union Pac. R. R. Co. v. Chicago, 57 Fed. 309-326;
Bennelac v. Richards, 125 Cal. 427;
Butler, etc. Co. v. Cleveland, 220 Ill. 128.

And it is Hornbook law that in such a case a stockholder is in exactly the same position.

Kessler v. Emsley Co., 141 Fed. at p. 134;

And same case on appeal in this circuit:

148 Fed. at p. 1019;

3 *Cook on Corporations*, 7th Ed. Sec. 744.

And it is also in obvious accord with principles of equity that a stockholder who has knowingly shared in the moneys received by a corporation from a sale of its property cannot upon the ground that he is a stockholder repudiate the transaction which has brought the money into the corporation.

> "Where the objection to the acts of a corporation is that they are *ultra vires*, without being either *mala prohibita* or *mala in se*, a stockholder cannot maintain an action in his own behalf based on such objection, where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder. Whether his conduct in so doing constitutes an estoppel in the strict sense of that term or a *quasi*-estoppel, as Mr. Bigelow puts it (Bigelow on Estoppel, 4th ed., chap. XIX) or be denominated merely an acquiescense or an election, or the assumption of a position inconsistent with an attack, makes no essential difference here."

Wormser v. Metropolitan Street Ry. Co., 184 N. Y. at pp. 87, 88 and 91.

II.

IN THE DECREE THE COURT FINDS THAT APPELLANT NEVER PERFORMED, OR OFFERED TO PERFORM, THE CONTRACT WHICH HE SEEKS TO HAVE SPECIFICALLY ENFORCED ALSO THAT HE WAS NEVER AT ANY TIME READY, ABLE AND WILLING TO PERFORM IT. THESE FINDINGS ARE NOT ATTACKED BY ANY ASSIGNMENT OF ERROR AND THEY ARE FATAL TO THE APPELLANT ON THIS APPEAL.

The agreement which appellant asks this Court to enforce contains the following provision:

> "E. It Is Further Mutually Covenanted and Agreed that this agreement shall expire by limitation on June 16, 1919, and shall carry with it the option hereinbefore mentioned as executed on January 16, 1919, which shall also expire by limitation on said date, and they shall be of no further force or effect if the first party shall not have negotiated the loan and secured the money provided in Paragraph 1 hereof.
>
> "Time is the essence of this agreement" (Record, p. 1164).

The decree, among other matters, finds the following facts:

> "* * * said plaintiff never performed, or offered to perform, the covenants and agreements upon his part to be performed under the terms of said contract of April 2, 1919, and that he was never at any time, ready, able and willing to perform the said covenants and agreements of said contract" (Record, p. 1438).

There is no assignment of error directed to the foregoing findings. This Court has repeatedly de-

clared that in equity cases it will not review recitals of fact found in the opinion of the trial Court.

McFarland v. Golling, 76 Fed. at p. 24;
Russell v. Kern, 69 Fed. 94;
Caverly v. Deere, 66 Fed. 308.

Were it otherwise, the result in this case would not be changed, for the recitals which we have quoted from the decree are in complete harmony with those on the same subject found in the opinion of the Court. The opinion—referring to June 16, 1919—the date when the contract sued on was to expire by limitation—says:

> "Prior to that date no deposit in the Wells Fargo Nevada National Bank of San Francisco of an amount sufficient to liquidate the indebtedness of the defendant corporations was made by or for Taylor. He never performed what he agreed in the contract to do; he never made an unconditional offer of performance, and never prior to June 16th was he actually ready, able and willing to perform unconditionally" (Record, pp. 1435, 1436).

There is nothing whatever in any of the assignments of error which attacks the foregoing recitals either as they appear in the opinion or in the decree.

The rule laid down by this Court and universally followed is embodied in the following quotation:

> "We decline to discuss this question, for several reasons: * * * There is no assignment of error which presents this point for the consideration of this court, and there is no 'plain error not assigned' which would author-

ize this court to notice it. (Rule 11 of this court, 32 C. C. A. lxxxviii.) The necessity of having assignments of error filed before the appeal is taken, in order to authorize the examination of any question, is fully and clearly stated by this court in *Lloyd v. Chapman,* 35 C. C. A., 474, 93 Fed. 599."

Savings & Loan Soc. v. Davidson, 97 Fed. at p. 702.

The case in the particular under discussion is obviously one which presents no "plain error not assigned", and we have only to consider, therefore, the legal effect upon respondent's case of the facts thus conclusively established in the decree.

Probably no rule in equity is more firmly settled than that which holds it essential that when time is of the essence of a contract the party seeking specific performance must, within the time limited, have performed or have offered to perform the obligations imposed upon him by the contract. And if he has only offered to perform, he must in fact at the time of such offer have been ready, able and willing to perform.

Bernier v. Griscom-Spencer Co., 161 Fed. 438 at p. 441.

"It is perfectly obvious, we think, from an inspection of this record, that the complainants at no time tendered to the defendant the sum of $60,000 at the National Bank of North America in the city of Boston or elsewhere, or ever professed a willingness to pay him that sum until he had deposited the entire capital stock of the water-supply company in the Bos-

ton bank aforesaid, which deposit of stock, as the complainants well knew, the defendant was not prepared to make. Under these circumstances we must conclude, as the circuit court appears to have done, that the complainants were not entitled to specific performance of the contract, for the reason that they never placed the defendant in default by tendering to him the sum which he was clearly entitled to receive before the delivery of any stock."

Wescott et al. v. Mulvane, 58 Fed. 305, at p. 308;

Kelsey v. Crowther, 162 U. S. at pp. 408, 409;

Pomeroy's Specific Performance of Contracts, 2 Ed., Sec. 323, p. 399.

III.

THE ATTEMPTED ASSIGNMENTS OF ERROR ARE ONE AND ALL FATALLY INSUFFICIENT.

In this case it is very certain that there are no plain errors on the face of the record such as would move the Court to notice them of its own motion, even though not attacked by any assignment of error. The attempted assignments of error are nine in number (Record, pp. 1469-1472). Three of these,—viz.: those numbered I, II and VIII,—are merely general assertions that the Court erred in making its final decree, or that said decree is not supported by the evidence, or that it is contrary to the evidence, or that it is against law, or that the

Court erred in overruling and denying plaintiff's petition for a rehearing.

It is a very familiar rule that such assignments as Nos. I, II and VIII are too general to be noticed and will be disregarded by this Court.

> *Doe v. Waterloo Mining Company,* 70 Fed. 461;
>
> *U. S. v. Ferguson,* 78 Fed. 103;
>
> *Hart v. Bowen,* 86 Fed. 877, 882;
>
> *Florida Central etc. Co. v. Cutting,* 68 Fed. 587.

The remaining assignments, viz.: Nos. III, IV, V, VI, VII and IX, are not only amenable to the objection just urged against the other three assignments,—i. e., that they are too general—but they are not addressed to the decree of the Court at all. They are mere attacks upon the opinion which was filed in the case (Record, pp. 1470-1471).

The rule in such cases is as follows (italics ours):

> "The assignment of errors is objected to as 'uncertain, insufficient, and not a compliance with the rules of the court'. It contains numerous specifications which need not be considered, *because they are aimed at the opinion of the court, and not at the decree rendered. Caverly v. Deere,* 13 C. C. A. 452, 66 Fed. 305, and 24 U. S. App. 617; *Russell v. Kern,* 16 C. C. A. 154, 69 Fed. 94, and 34 U. S. App. 90; *Davis v. Packard,* 6 Pet. 41, 48."
>
> *McFarlane v. Golling, et al.,* 76 Fed. 23, at p. 24.

The ultimate facts upon which the decree rests are fully recited in the decree itself (Record, pp. 1437-1438), and as to the matters thus set forth in the decree no error is assigned.

It will be noticed that assignments Nos. III and IV are addressed to that portion of the *opinion* which appears in the record at pp. 1423-1428. The fact that assignments III and IV are directed against the recitals of the opinion is also stated by opposing counsel on page 21 of appellant's opening brief.

Assignment No. V is directed against a statement of the Court appearing in said *opinion* at p. 1423 of the record; while assignment No. VI attempts to attack a passage which is quoted in *haec verba* from the *opinion* (Record, p. 1435). See also appellant's opening brief, p. 36, where it is stated that assignments V and VI are addressed to the opinion.

Assignment No. VII is avowedly addressed to the *opinion*.

Assignment No. IX is directed to a portion of the *opinion* appearing on page 1435 of the record.

The foregoing review covers all of the assignments which the appellant filed with his petition on appeal.

Under the authorities noted (and there are, of course, many others of like tenor among the Federal decisions) the assignments of error cannot be

considered, and there is nothing whatever, either in the facts or the law, for this Court to review.

IV.

THE CHARGES OF FRAUD ARE UTTERLY WITHOUT MERIT.

Since the demand for relief against respondent Loring is based upon the charges of fraud which although not made against him are made against the other defendants, we shall examine them briefly. We shall assume—contrary to the fact and for purposes of argument merely—that there are assignments of error sufficient to justify this Court in inquiring into the trial Court's findings on the question of fraud.

In its decree the trial Court finds as follows:

> "That the defendants did not, nor did any or either of them, either acting for themselves or for any other person or persons, or otherwise, make to the plaintiff at any time any false and fraudulent, or false or fraudulent, representations whatsoever.
>
> "It is not true that the plaintiff was induced to enter into the contract of April 2, 1919, a copy of which is attached to plaintiff's complaint, marked Exhibit 'C', or to perform its conditions, or any or either of them, by reason of any false and fraudulent, or false or fraudulent representation or representations whatsoever" (Record, pp. 1437-1438).

The authorities often refer to the strength and character of the evidence which the courts deem

necessary to sustain a charge of fraud. They all agree that

> "To establish fraud, the proof must be clear, unequivocal and convincing."
>
> *In re Hawks,* 204 Fed. 309, 316.
>
> "The presumption is always against fraud—a presumption approximating in strength to that of innocence of crime."
>
> *United States v. Southern Pacific Company,* 260 Fed. 520 (Ninth Circuit);
>
> *Truett v. Onderdonk,* 120 Cal. 581, 588, per Judge Van Fleet (now of this circuit) when upon the Supreme Bench of California.

In the face of the foreging rules, it is nothing short of ridiculous to claim that plaintiff has established the charges of fraud set forth in his bill.

(a) *The first charge of fraud:*

This charge is that four persons,—Poole, Murrish, Nenzel and Friedman,—*by means of telegrams and letters*—falsely represented that new development work "had developed and placed in sight, blocked out and made ready for mining, large quantities of scheelite ore of commercial value and capable of being concentrated and concentrates so returned being of great value" (Record, p. 1423).

The evidence shows that while Nenzel sent a number of telegrams and letters to the plaintiff, neither Poole, nor Murrish, sent any letter or telegram to him, nor is there any evidence whatever that either of them or Friedman ever saw or knew

the contents of the letters and telegrams sent by Nenzel. Friedman sent a wire to the plaintiff on March 25, 1919, which reads as follows:

> "Suggest that you and Bancroft come here some time this week. All stockholders are here now and am sure you will find mine development fulfill your most sanguine expectations and am confident that we will arrive at some modified arrangement as suggested in your correspondence" (Record, p. 796).

Bancroft was the plaintiff's mining expert. An invitation to the plaintiff, such as is contained in the foregoing telegram, to come and bring his expert and examine a mine, would be strange evidence upon which to base a finding of false and fraudulent representations as to the ore in sight in that mine. This leaves only Nenzel's telegrams and letters to be considered. Nenzel wrote or wired to plaintiff at intervals between February 15, 1919, and March 27, 1919. Two months later, after the last of these letters or telegrams was written, Bancroft on May 24, 1919, for a second time examined the property, took some samples and had them assayed. These assays, as the Court found, corroborate substantially the statements made by Nenzel in his letters and telegrams to Taylor, but the mere fact that the assays so taken by Bancroft do not agree exactly in all particulars with those referred to by Nenzel is relied upon by the appellant as proving that Nenzel's statements were wilfully false and fraudulent. There is no evidence that the ore, assayed by Bancroft, was taken

in the identical places, or in the same manner, or in the same quantity as the samples from which the Nenzel assays resulted. Moreover, the Bancroft assays were fire assays, while these made at the mine were "pan assays" and Taylor was so informed. Work had been going on in the mine for over two months after Nenzel's last letter was written. Anyone who knows anything about mine assays realizes that they will differ greatly in a small area, however carefully and honestly taken. To brand a man as guilty of wilful fraud upon so flimsy a showing as is here presented would be to perpetrate a gross wrong. The Court very properly found that no such fraud had been committed, saying not only what we have quoted *supra* from the final decree, but also in its opinion:

> "In view of this correspondence and Bancroft's second report, it is impossible to find that the letters and telegrams in evidence from defendant to Taylor prior to April 2, 1919, contained fraudulent misstatements, or that by anything in such letters and telegrams Taylor was misled" (Record, p. 1428).

Complaint is made in appellant's opening brief that one of Nenzel's representations was that a vein fifteen feet wide had been opened up in a certain place, and that this statement was untrue.

The evidence relied on to prove it untrue is a so-called plate, No. 5A, attached to Bancroft's supplemental report (Appellant's Opening Brief, pp. 26, 29).

But Bancroft does not attempt to say that the said plate shows the width of the vein at every point (see Bancroft's testimony, Record, pp. 240, 242).

All that Bancroft's plate shows could have been absolutely true without in any degree contradicting Nenzel.

(b) *The second charge of misrepresentation:*

The gist of this charge is that Poole, Nenzel and Murrish at Denver on April 2, 1919, falsely and fraudulently represented to Taylor that there was then "blocked out, in sight and ready for mining and reduction into concentrates 60,000 tons of scheelite ore, which would carry an average of 1.75 per cent. tungstic acid" (Record, p. 1133).

In his written opinion the trial Judge said:

> "The evidence is not sufficient to show that the alleged false representations as to tonnage in the mine were made" (Record, p. 1435).

In its decree the Court found:

> "That the defendants did not, either acting for themselves or for any other person or persons, make to the plaintiff at any time any false and fraudulent, or false or fraudulent, representations whatever" (Record, p. 1437).

The plaintiff Taylor testified that the representations as to tonnage and tungstic acid contents were made to him by Poole in the presence of Nenzel and Murrish (Record, p. 56).

Poole, Nenzel and Murrish flatly and unequivocally deny that such representations were made (Record, pp. 471, 616 and 649).

Appellant's counsel fully recognize the fact that the evidence is conflicting. In their opening brief they say, at page 50:

> "There is, however, a sharp conflict in the testimony as to whether any representations as to tonnage or percentages were made."

While admitting this conflict, appellant's counsel, nevertheless, in the face of the well-established rule of this Court regarding the conclusions of a Chancellor on conflicting evidence where the Chancellor has had an opportunity to see and observe the witnesses, asks this Court to pass upon the credibility of these same witnesses and to reverse the trial Court upon the facts.

This Court has always declined to interfere in such cases with the findings of the trial Court.

> "Another equally well established rule of law is that, while the findings of the chancellor in an equity case on conflicting evidence, have not the conclusive effect given to the verdict of a jury or of the trial judge when a jury has been waived, they are entitled to high consideration, and *unless clearly against the weight of the evidence,* or induced by an erroneous view of the law, they will not be disturbed by the appellate court, and this applies with greater force when practically all the testimony was taken in open court, *affording the trial judge the opportunity to note the de-*

meanor of the witnesses for the purpose of determining their credibility, which the appellate court hearing the case on a printed record, has not" (italics ours).

Unkle v. Wills, 281 Fed. at p. 36, and cases cited.

"It is the settled rule of procedure that where the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding it must be treated as unassailable'. *Adamson v. Gilliland,* 242 U. S. 350, 353, 37 Sup. Ct. 169, 170 (61 L. Ed. 356)."

Snow v. Snow, 270 Fed. at pp. 366, 367.

"It was tried in open court, with full opportunity in the trial justice to observe the demeanor of witnesses and to judge of their veracity. In such cases the finding of the trial justice on questions of fact has much the same sanctity as the verdict of a jury, and will not be disturbed on appeal unless a mistake of judgment is so apparent as to demand a reversal."

McLarren v. McLarren, 45 App. D. C. 237, 238.

See also:

Benedict v. Setters, 261 Fed. at p. 503;

Porto Rico Mining Co. v. Conklin, 271 Fed. at p. 577;

United States v. Delatour, 275 Fed. at p. 138;

Board Improvement District No. 2 v. Missouri Pacific R. Co., 275 Fed. at p. 603.

In the case at bar there can be no occasion whatever to doubt the correctness of the Chancellor's conclusions upon the facts. This Court is asked to disregard the testimony of three witnesses and to accept in its place the testimony of the plaintiff.

The untrustworthiness of the plaintiff is sufficiently evidenced by the following answer which he made when confronted with one of the letters which he himself had written to one of the defendants:

> "Q. Calling your attention * * * to the following phrase: 'Nobody in the East wanted to tackle the proposition unless they had control and we were unwilling to give that up.' Do you recall making that statement?
>
> "A. I do not particularly recall it, but if it is in the letter I made it.
>
> "Q. Was that true or false?
>
> "A. I don't know, sir" (Record, p. 181).

It is the testimony of the man who gave that answer which this Court is asked to accept in the face of the testimony of three witnesses who flatly contradicted him and in the face of the trial Court's conclusions.

The trial Court's estimate of Taylor's credibility is abundantly shown throughout its written opinion. When it is remembered that Taylor had repeatedly sworn that he was misled and deceived, the following excerpt from the opinion sufficiently illustrates the impression which he made on the trial Judge:

> "In my judgment Taylor was neither misled nor deceived by the defendants. He was fol-

> lowing consistently an original plan to secure the property for the smallest possible outlay of money on his part" (Record, p. 1435).

There is certainly no obvious mistake of fact in the conclusions of the trial Court, nor has the appellant pointed out any error whatever in the application of the law to the facts as found by the Chancellor.

There is, therefore, no occasion whatever, to take this case out of the general rule so firmly established in the United States Circuit Court of Appeals and noted in the authorities referred to *supra*.

Dated, San Francisco,
May 7, 1923.

Respectfully submitted,

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